

Disclaimer: This fact sheet is provided for informational purposes only and is not intended as legal advice. It is based on information available at the time of publication and may not reflect recent changes in law or policy. The content offers a general overview and should not be relied upon as a substitute for legal advice.

Marriage Breakdown in Family Businesses

- In general, and absent any prenuptial agreements, a divorcing spouse is entitled to half of whatever growth there has been in the net family assets from the date of marriage to the date of separation.
- Without proper legal and financial safeguards, a divorce could result in the forced division of business assets or even the need to sell your company to satisfy marital property division laws. A business is usually the family's most important asset. It is typically the product of an individual's life's work and is how they make their living.
- Generally, businesses acquired or established during the marriage are subject to division as marital property
- Although divorce may feel like an uncomfortable topic or unlikely occurrence for a happily married couple, it is essential for business owners, especially those in family enterprises, to plan proactively. Taking steps to protect the business now can prevent significant disruption, legal complications, and financial loss in the future. A clear plan ensures the long-term stability of both the business and family relationships, even in the face of unexpected challenges. In many cases, the absence of a pre-divorce plan can lead to court involvement or even the sale of the business.

Relevant Legislation – The Martial Property Act

- Preamble
 - o It is advisable to provide for a presumption, in the event of the breakdown of the marriage, of equal sharing of the family and commercial assets of the parties to the marriage acquired by them during the marriage
- Section 4(1)
 - o This act does not apply to any asset acquired by a spouse
 - (a) while married to but living separate and apart from the other spouse; or
 - (b) while married to a former spouse unless the asset was acquired while living separate and apart from the former spouse and it can be shown that the asset was acquired in contemplation of marriage to the present spouse; or
 - (c) while unmarried
- Section 7(3)
 - o This act does not apply to any asset acquired by a spouse by way of inheritance, unless it can be shown that the inheritance was devised or bequeathed with the intention of benefitting both spouses
- Section 10
 - o This act does not apply to any asset that has already been shared equally between spouses, or that is acquired by one spouse from the other by virtue of a sharing of assets under this act

Navigating Divorce in Family Business

- Divorce and Its Implications for Family-Owned Businesses
 - o Divorce can hamper the day-to-day operations of the business
 - Divorce can pull you (and your partner, if they are also involved in the business) away from the day-to-day administrative and managerial responsibilities of the business, potentially hurting business operations
 - o Divorce can be distracting for your employees
 - A divorce taking place within the organization may become a distraction for employees in the workplace
 - o Disruption of business synergy
 - Divorce in a family business can severely disrupt business synergy as personal conflicts may spill into professional settings, potentially undermining collaboration and decision-making. Tensions between the couple may lead to mistrust, conflicting agendas, and stalled strategic progress. Additionally, employees may take sides or feel caught in the middle, reducing morale and impairing team cohesion.
- If your spouse is directly involved in the business, consider what the impact of their departure from the business would be and plan for it
- Put in place practices that can shield your business operations from the effects of divorce
 - o These practices may include hiring non-family employees, keeping personal and business matters and expenses separate, and maintaining thorough business records

Pre-Emptive Steps You Can Take to Protect Your Business from Divorce

- Prenuptial or Postnuptial Agreements
 - o Draft and sign a prenuptial or postnuptial agreement that clearly outlines how the business will be treated in the event of a divorce between the couple. Within this agreement, the rights and responsibilities of each spouse should be clearly defined
- Detailed Record Keeping
 - o Maintain detailed and current records of the business's financial transactions, contracts, operational decisions, and other documents.
- Maintain Separate Finances
 - o Create and maintain a clear separation between personal finances and business finances
- Regular Business Valuations
 - o Periodically conduct business valuations to assess the current worth of the business. Having this number remain up to date can assist in providing a base for negotiations
- Buy-Sell Agreements
 - o Implement a buy-sell agreement that dictates what happens to a spouse's shares if there is a divorce
- Preventative Legal Consultation
 - o Proactively consult with a family lawyer experienced in business matters to gain a more developed understanding of the legal landscape surrounding the future consequences of divorce in a family business and obtain legal advice on how to structure agreements and operations to best protect the business

- Update Estate Planning Documents
 - o Ensure that relevant estate planning documents, such as wills and trusts, align with the desired distribution of business assets in case of potential divorce

Key Strategies to Consider When Protecting Your Business from Divorce

- Create a Marriage Contract or Prenuptial Agreement
 - o This legally binding agreement can outline how business assets will be handled in the event of a divorce.
 - o Key provisions to include are
 - How will any appreciation in business value during the marriage be treated
 - What portion, if any, the non-owner spouse is entitled to receive
 - How business operations will be maintained moving forward (especially if the couple is both heavily involved in the business and has a desire to remain involved in some capacity)
- Limit Spousal Involvement in the Business
 - o If your spouse plays an integral role in your family business, such as serving on the management team, they may assert a claim to ownership or a financial interest in the business based on the sweat equity they have contributed to its success
 - o By minimizing your spouse's involvement in the business, you reduce the strength of their claim on business assets or the business
- Establish a Shareholder or Partnership Agreement
 - o Include provisions to protect against marital breakdown
 - o A few things to consider include
 - Restrictions on share transfers – ensuring that business ownership remains with the original owners and is not transferred to an outside individual
 - Buyout or Buy-sell clauses – allowing remaining business partners to buy back shares in the event of divorce
 - Pre-emptive rights, which gives business partners the right to purchase any potential equity that would be going to a divorcing spouse
- Consider Incorporating, Where Possible
 - o If you operate as a sole proprietorship, your business is legally indistinguishable from your personal assets, making it more vulnerable in the event of a divorce
 - o Incorporating your business can offer benefits such as
 - Establishing a separate legal entity, making it harder to classify the business as personal property
 - Providing additional asset protection strategies, such as limiting liability
 - Creating more flexibility in the ability to structure ownership to protect yourself in the event of divorce
- Keep Business and Personal Assets Separate
 - o Having a business that operates as a separate legal entity with its bank accounts, credit lines, and financial records helps.

- This helps establish the business in a manner that is distinct (though the shares may be marital property) (an example of marital property would be a shared car)
- This minimizes any arguments made by a spouse that the business is a family asset
- This step helps create greater protection if only one spouse is heavily involved in the business
- Note: While incorporating comes with its benefits, it does not completely shield you in the event of divorce; it simply provides an extra layer of protection (as mentioned, the shares underlying the corporation may very well be marital property)
- **Consult a lawyer**
 - Based on when the marriage was created and how it operates, a lawyer may be able to provide ideas on other premarital steps that may be taken to protect the business